

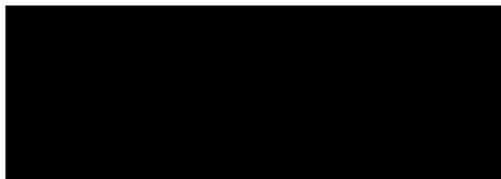
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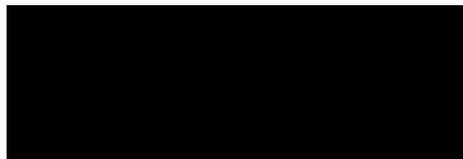
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FILE: WAC 07 146 50037 Office: CALIFORNIA SERVICE CENTER Date: **NOV 24 2008**

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an Internet retailer of women's shoes and apparel. It was incorporated in March 2006, claims to employ 20 personnel, and to have had \$6,000,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a management analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition determining that the proffered position is not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 filed April 2, 2007 with supporting documentation; (2) the director's May 23, 2007 request for additional evidence (RFE); (3) the petitioner's August 17, 2007 response to the director's RFE; (4) the director's September 29, 2007 denial letter; and (5) the Form I-290B, with counsel's brief, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner seeks the beneficiary's services as a management analyst. In a March 30, 2007 letter appended to the petition, the petitioner indicated that the beneficiary's duties will include but not be limited to the following:

- Analyze operational procedures to devise the most efficient methods of accomplishing work;
- Develop and implement records management programs for filing, protection, and retrieval of records, and assure compliance with programs;
- Analyze data gathered, develop information and consider available solutions or alternate methods of proceeding;
- Document findings of studies and prepare recommendations for implementation of new systems, procedures and organizational changes;
- Interview personnel and conduct on-site observations to ascertain unit functions, work performed, and methods, equipment, and personnel used;
- Gather and organize information on problems or procedures including present operating procedures; and
- Recommend implementation of new systems, procedures or organizational charges [sic].

In response to the director's RFE, the petitioner provided: an excerpt from the Department of Labor's *Occupational Outlook Handbook (Handbook)* on the occupation of management analysts; an excerpt from the Department of Labor's *Online O*NET (O*NET)* summary report on the occupation of management analysts; and an excerpt from the Department of Labor's *Dictionary of Occupational Titles (DOT)* on the occupation of management analysts. The petitioner also submitted copies of two job announcements. One announcement for analysts and managers for a small IT consulting firm that provided a list of skills but did not describe the duties of the position(s). The advertisement noted an education level as "bachelor's degree" but did not indicate whether this was a requirement or preferred and did not identify a specific field of study. The second announcement was for business analysts for a skin care products firm that provided a description of the duties expected and listed the education for the position as a bachelor's degree in accounting, finance, IT or a related field and indicated that an advanced degree (MBA, CPA, CMA) is desirable as well as Oracle certification. The petitioner also submitted a partial copy of its 2006 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Federal Income Tax Return showing \$2,649,851 in gross annual income and \$302,413 in taxable income.

The petitioner, in a July 18, 2007 letter in response to the director's RFE stated:

As a growing company we are in need of a Management Analyst in order to compete with other companies. [The beneficiary] will be responsible in leading our expansion plan for both our domestic [sales] and especially for international sales, and be a liaison for our international client focusing on customers located in Korea. In addition to improving our profit, she will also be responsible for improving the work environment, thus increasing the productivity of our employees, creating workshops in ways where we can better assist our clients, and hire and train our newly hired employees (in which she will be extensively train [sic] beforehand).

Here is a short list of the duties with which [the beneficiary] will be tasked in:

- Train and assist in hiring new employees in Korea
- Planning workshops for our employees to attend
- Planning biannual event
- Researching in what the needs of the clients are
- Analyzing Korean market
- Assist clients residing in Korea
- Analyzing company workflow in order to improve working conditions and to increase profit margins.

[The beneficiary] will be doing 40 percent of analyzing, researching, and finding solution to improving the growth of the company and productivity, 30 percent training and hiring our employees, 20 percent in assisting our Korean client, 10 percent in creating event, workshop and etc.

The petitioner also submitted an August 17, 2007 opinion prepared by [REDACTED] Ph.D., Professor of Management and Information Systems, Former Dean of the School of Business & Economics, Seattle Pacific University. [REDACTED] indicated he had reviewed the petitioner's job description for its management analyst and opined: "the Management Analyst position deals exclusively with internal business processes and management," and "[t]herefore I conclude that it would be considered a specialty occupation normally requiring the equivalent of a broad range of degrees including a U.S. Bachelor's Degree in Public Administration, U.S. Bachelor's Degree in Business Administration, U.S. Bachelor's degree in Industrial Administration, or a related degree." [REDACTED] further opined:

Management Analyst jobs in this industry require: analyzing the operation procedures of the business; evaluating the effectiveness of business systems; developing new or improved business procedures and systems; developing and implementing records management systems and procedures to assure records security and irretrievability; leading in the development and implementation business work tasks including technology, system and personnel requirements; analyzing the organization's reporting structure; analyzing the firm's operations[;] recommending improvements to competitiveness and profitability; managing complex projects; possessing a high level of communications skills; and performing as both an individual and team contributor.

These duties are specialized and require professional theoretical level knowledge in the business areas covered in the course work of a U.S Bachelor's Degree in Public Administration, U.S. Bachelor's Degree in Business Administration, U.S. Bachelor's degree in Industrial Administration, or equivalent.

Dr. Knight concluded that the petitioner's management analyst position is a professional specialty occupation that would require a U.S. Bachelor's Degree in Public Administration, U.S. Bachelor's Degree in Business Administration, U.S. Bachelor's degree in Industrial Administration, or equivalent.

On September 29, 2007, the director denied the petition. The director noted that the petitioner's description of the duties of the position reflected some of the duties of a management analyst as depicted in the *Handbook*, but found that sole reliance on a list of those duties is misplaced. The director observed that the petitioner's IRS Form 1120 for 2006 showed income of two million dollars, a figure at odds with the petitioner's projected income of six million dollars. The director determined: that the petitioner's business operations, processes, or services are not of a scope or complexity that would require a management analyst to review its business functions such as human resources, marketing, logistics or information systems, or to restructure its business organization for effectiveness; that the record did not establish that the petitioner had a logistical system complicated enough to require a management analyst to assess the procurement, maintenance, and/or distribution processes necessary to supply the material, products, or services the petitioner offered; that the record did not establish that the proffered position included complex or advanced duties such as building and solving mathematical models, or that the position required an individual with knowledge of sophisticated analysis techniques normally associated with a typical, *bona fide* management analyst; and that the petitioner's business was not a management, scientific, technical consulting firm involved in computer systems design or related services or a federal, state or local government or a business for which a management analyst would typically be required on a regular full- or part-time basis. The director found that the actual duties of the position are more similar to that of a general manager and that such a position did not meet any of the criteria for classification as a specialty occupation.

On appeal, counsel for the petitioner asserts that CIS failed to consider the arguments and supporting evidence submitted in response to the RFE; that the petitioner needs the services of a business consultant for its expansion; and that the conclusion of a recognized expert that the position is a specialty occupation should be sufficient. Counsel submits the petitioner's response to the RFE and requests that the all the documentation provided be considered.

The AAO acknowledges that the director did not specifically list the evidence submitted in response to his RFE when issuing the September 29, 2007 decision. Although the director could have provided a more detailed explanation regarding the information submitted in response to the RFE, the director's ultimate conclusion is proper. The AAO will more thoroughly discuss the evidence in the record to provide a more complete understanding of the deficiencies of the record.

As the director noted, to determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384

(5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. In this matter, the petitioner's description of the proffered position is insufficient to establish that the position is that of a management analyst.

The 2008-2009 edition of the *Handbook* discusses the employment of management analysts as follows:

As business becomes more complex, firms are continually faced with new challenges. They increasingly rely on management analysts to help them remain competitive amidst these changes. Management analysts, often referred to as *management consultants* in private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits.

For example, a small but rapidly growing company might employ a consultant who is an expert in just-in-time inventory management to help improve its inventory-control system. In another case, a large company that has recently acquired a new division may hire management analysts to help reorganize the corporate structure and eliminate duplicate or nonessential jobs. In recent years, information technology and electronic commerce have provided new opportunities for management analysts. Companies hire consultants to develop strategies for entering and remaining competitive in the new electronic marketplace.

* * *

Management analysts might be single practitioners or part of large international organizations employing thousands of other consultants. Some analysts and consultants specialize in a specific industry, such as health care or telecommunications, while others specialize by type of business function, such as human resources, marketing, logistics, or information systems. In government, management analysts tend to specialize by type of agency. The work of management analysts and consultants varies with each client or employer, and from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the organization's managers. In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers.

The generic nature of the petitioner's description is insufficient to establish that the day-to-day duties of the proffered position include the routine duties of a management analyst. The petitioner initially provided an overview of an occupation and did not detail the duties of the position as they relate to the petitioner's Internet retail business. The petitioner's initial description of the duties of the position included elements comparable to the *Handbook's* overview of the occupation of a management analyst; however, as the director noted the overview of an occupation as outlined in the *Handbook* does not establish a position is a specialty occupation. Such an overview which includes only a generalized description is necessary when defining the range of duties that may be performed within an occupation, but is insufficient when used by a petitioner to discuss the duties attached to specific employment. When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

The petitioner's description of the proffered position in response to the director's RFE, although providing more information regarding the proffered position also failed to establish that the daily duties of the position would incorporate the duties of a management analyst. The petitioner stated that the beneficiary would assist in its expansion, but did not provide any evidence of such an expansion, such as a business plan, capitalization plans, agreements with other entities, client lists, or any documentation that would substantiate the petitioner's expansion plans. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, training and assisting with hiring in Korea, planning employee workshops, researching clients' needs, and assisting clients in Korea, without more detail of the exact nature of these tasks, are not the duties of a management analyst. Similarly, the petitioner's indication that the beneficiary will spend 40 percent of her time analyzing, researching, and finding solutions to improving the growth of the company and productivity does not provide the necessary detail relating this general statement of duties to the nature of the petitioner's Internet retail business. When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. Vague references to various responsibilities without documentary evidence and without providing detail of the tasks the beneficiary will perform in relation to the petitioner's specific business is insufficient to establish that the duties of the proffered position will involve the theoretical and practical application of a body of highly specialized knowledge that require the attainment of a bachelor's or higher degree in a specific specialty. The petitioner does not sufficiently describe how it will utilize the services of a management analyst in its business operations.

The AAO agrees that the size of the petitioner's operation and the type of the petitioner's industry do not affect the need or lack of a need for a professional. The director's determination to the contrary is withdrawn. The actual duties the incumbent in the proffered position will perform for the petitioner are the determining factors. Here, the petitioner has not described how the individual in the proffered position will improve the organization's structure, efficiency, or profits or review problems within the organization and devise solutions for those problems. The petitioner has not offered evidence of studies that need to be conducted or documented preparations for new systems, procedures, or organizational changes. The description provided does not focus on the specific requirements of this petitioner who claims to employ 20 personnel and to have projected gross annual income of six million dollars.¹

The AAO acknowledges counsel's reference to the *DOT* and its SVP rating of 7 for the occupation of "management analyst" and the *O*NET* and its indication that most of these occupations require a four-year

¹ The petitioner does not provide any documentary evidence of its projected gross annual income. The petitioner's IRS Forms 941, Employer's Quarterly Tax Return, show two employees for the second quarter of 2006, four employees for the third quarter of 2006, five employees for the fourth quarter of 2006, and fourteen employees for the first quarter of 2007. The record does not include evidence that the petitioner employed 20 personnel when the petition was filed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

bachelor's degree, but some do not. The AAO, however, does not consider the *DOT* or the *O*NET* to be persuasive sources of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. Both the *DOT* and the *O*NET* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating, for example, is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, the record does not demonstrate that the petitioner's generic description of the duties of its "management analyst" would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

In reaching its decision, the AAO has reviewed [REDACTED] position evaluation. [REDACTED] bases his opinion on the general description of duties the petitioner provided and on a broadly stated description of the duties of the occupation of a management analyst. [REDACTED] does not relate the petitioner's description of the duties of the proffered position to any of those duties outlined for the occupation of a management analyst. [REDACTED] concludes, without analysis, that the broadly stated overview of the occupation of a management analyst would require a bachelor's degree in one of three different fields, business administration, public administration, or industrial administration. [REDACTED] does not note which particular duties of the petitioner's description are complex, does not indicate that he reviewed the petitioner's business operations, visited the petitioner's worksite, interviewed the petitioner's executive personnel, or otherwise understood the nature of the petitioner's business or the actual duties of the proffered position. The AAO observes that a management analyst position does require a bachelor's degree in a specific field. However, [REDACTED] in this matter, does not adequately evaluate the position the petitioner described rather than concluding generally that a management analyst position would require a bachelor's degree in one of three specific disciplines. [REDACTED] does not provide sufficient details about the complexity of the duties in relation to the petitioner's business to substantiate his conclusion that the petitioner's proffered position is a management analyst position that requires a bachelor's degree in a specific discipline. There is an inadequate factual foundation established to support the opinion. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The overly broad description does not establish that the actual duties of the position require a bachelor's degree in any particular field. [REDACTED] opinion is not sufficiently specific and is not supported by substantive evidence to establish any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As discussed above, the AAO requires information regarding the actual responsibilities of a proffered position to make its determination regarding the nature of that position and its degree requirements, if any. Without such information, the AAO is unable to determine that the tasks to be performed by the beneficiary on a day-to-day basis are duties of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent in a directly related academic specialty. As the record in the instant matter offers no meaningful description of the proffered position's responsibilities, the petitioner has not established that the duties of the position actually incorporate the duties of a specialty occupation. Accordingly, the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant matter, the record is deficient in information to establish that the generally described position is comparable to a specific position that incorporates the duties of a management analyst. The AAO has reviewed the two job announcements submitted and observes that the advertisement for analysts and managers does not describe the duties of the advertised position, does not indicate whether a bachelor's degree is preferred or required, and does not identify a specific field of study as the necessary preparation for entering the advertised position. The job announcement for a business analyst does not provide a description of duties that is comparable to the duties of the proffered position. Neither of these listings provides information demonstrating that the businesses publishing the advertisements are similar to the petitioner in size, number of employees, level of revenue, or type of business. Moreover, as the record offers only a generalized description of the proffered position, the advertisements may not be used to establish that the positions are parallel to those outlined by the petitioner. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. Absent a meaningful description or documentary evidence to substantiate the proposed duties of the position, the petitioner has not established that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The petitioner has not satisfied either prong of the criterion and, therefore, is unable to establish the proffered position as a specialty occupation on the basis of an industry-wide degree requirement or to distinguish it from similar, but non-degreed employment based on its unique nature or complexity. The petitioner has not submitted evidence sufficient to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Turning to the third criterion, the petitioner has not provided evidence that it normally requires a degree or its equivalent for the position. The AAO acknowledges that the petitioner is a newly formed company and has not previously employed a management analyst. The petitioner's desire to employ an individual with a bachelor's degree, however, does not establish that the position is a specialty occupation. The AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion does not establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. The petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The AAO next reviews the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) and finds that the duties of the position as depicted in the record are insufficiently detailed to establish that they are specialized and complex such that the AAO could conclude that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate degree in a specific field of study. When assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the position, not the occupation, or the industry-wide standard associated with the occupation. However, the petitioner has not provided a meaningful description of duties of the proffered position that could be associated with the duties of a management analyst or any position that would require knowledge usually associated with the attainment of a baccalaureate degree in a specific field of study. The petitioner has not established that the generally described duties are either specialized or complex. Again, the AAO finds that the petitioner has not explained how the proffered position incorporates the duties of a management analyst as it

pertains to the petitioner's organization. The duties depicted in the record are insufficient to establish the proffered position as a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For reasons related in the preceding discussion, the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reason. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.